

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration

between

CITY OF PHILADELPHIA,

“City”

- and -

F.O.P. LODGE NO. 5.

“Union”
-----X

AAA Case No.

14 390 01521 12

Opinion & Award

Re: Discharge of
Jonathan Josey

Hearings: June 24, 2013
June 25, 2013

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT

Cara Leheny, Esq., Divisional Deputy City Solicitor

For the Union

JENNINGS SIGMOND, P.C.

Thomas W. Jennings, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Lieutenant Jonathan Josey effective November 1, 2012. It did so based upon two charges of "Conduct Unbecoming" stemming from the events of September 30, 2012. The first alleges that Josey violated Section 1-§010-10 of the Police Department's Disciplinary Code by making false entries on documents he filed concerning his arrest of A ■■■ G ■■■ that day for disorderly conduct. The second asserts that Josey violated Section 1-§012-10 of the Code by using excessive force against G ■■■ in arresting her. (Joint Exhibits 4 & 5.)¹

The Union contends the City lacked just cause to discharge Josey. It asks that Josey be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that all references to the discharge be expunged from Josey's personnel file to the maximum extent permitted by law.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

At the time of his discharge, Josey had been a member of the City's Police Department for over nineteen years. During his tenure, the Department awarded him multiple commendations for bravery and meritorious service. (Union Exhibits 7 & 12.) His record does not reflect any active prior discipline. (Union Exhibit 7.)

¹ The Union represents that it has not accepted the current Disciplinary Code, but maintains instead that the Department implemented it unilaterally in 2010. (Joint Exhibit 6.) It notes that the implementation of the Code is the subject of an unfair labor practice charge pending before the Pennsylvania Labor Relations Board. In addition, it points out that the Act 111 Board of Arbitration has ruled that notwithstanding the terms of the Code, disciplinary arbitrators are empowered to determine the appropriateness of the penalty imposed by the City in any instance in which just cause to discipline is found.

Since 2009, he had served as a lieutenant in the Department's Highway Patrol Unit.² Having received specialized training concerning crowd control, the Department in recent years assigned him several times to lead a team of officers tasked with this function at events outside the City, including the G-20 and NATO Summits.

The circumstances that led to Josey's discharge arose from his assignment to police the "after-party" to the City's annual Puerto Rican Day Parade on September 30, 2012.

In his testimony, Inspector M [REDACTED] C [REDACTED], who had command responsibility for the after-party detail in 2012, related that it is the Department's most challenging public event.³ He described conditions there on September 30, 2012 as "controlled chaos," highlighting that open consumption/use of alcohol and illegal drugs and public intoxication were common. In addition, as is customary at this event, many attendees drove their cars in a procession through the streets with passengers, including children, hanging out of or riding on the outside of the vehicles.⁴

C [REDACTED] recounted that at the roll call for this detail, he and Captain F [REDACTED] V [REDACTED] advised the officers present that "tolerance was the order of the day," meaning

² Inspector M [REDACTED] C [REDACTED], who was the Highway Patrol Unit's commanding officer from 2004 – 2012, testified that contrary to its name, the unit does not focus on traffic enforcement on the City's highways. Instead, he explained, the unit is tasked with addressing felonies in high crime neighborhoods, policing major public events within the City and performing other key functions as assigned by the Department. He stated further that Highway Patrol is an elite unit within the Department, which is selective in the officers admitted to its ranks.

³ C [REDACTED] noted that in 2012, the Department assigned 722 officers to this detail, which is far greater than the number of officers assigned to police any other public event in the City. (Union Exhibit 3.) For example, in 2013, the Department assigned 150 officers to the detail for the Mummer's Parade on New Year's Day, which draws thousands of spectators and takes place over a much larger area of the City than does the after-party to the Puerto Rican Day Parade. (Union Exhibit 11.)

⁴ Each officer assigned to this detail who testified in this case provided a similar description of the conditions at this event. Those giving such corroborating testimony included Police Officers S [REDACTED] D [REDACTED], C [REDACTED] C [REDACTED], F [REDACTED] I [REDACTED] and B [REDACTED] T [REDACTED] and Sergeant C [REDACTED] W [REDACTED] as well as Josey.

that not all laws would be strictly enforced. Several officers assigned to this detail confirmed these instructions. One of those officers, Sergeant C [REDACTED] W [REDACTED] explained that the practice was to ignore offenses except those posing a serious threat to life or property.⁵

G [REDACTED] a regular attendee of the Puerto Rican Day Parade after-party, testified that she arrived for the event on September 30, 2012 at approximately 3 p.m. She related that by 6 p.m., she had joined the revelers congregating at the corner of Lehigh Avenue and Fifth Street. She recalled that as she watched the procession of vehicles at that location, she was holding an unopened bottle of beer in one hand, a can of silly string in the other, and a plastic cup in the crook of her right arm.⁶

According to G [REDACTED] shortly after she arrived there, the driver of one of these vehicles stopped his car in the intersection and then caused it to go into a series of circular skids, commonly referred to as “doughnuts.” Once the driver again stopped his vehicle, the police officers present approached the car. G [REDACTED] related that she, in turn, moved to her right to gain a view of the car and the officers’ actions toward the driver. She recalled that after doing so, she sprayed silly string in the air, but not at the police, and then felt liquid strike her neck.

In response, she turned to see who had thrown the liquid. When she looked back in the other direction, she observed several police officers, including Josey, coming

⁵ Josey, who conducted the separate roll call held for the Highway Patrol Unit members assigned to this detail, recounted advising the officers present that their priority was to keep traffic flowing while protecting themselves. He explained that if it became necessary to make an arrest, they should be mindful of the presence of cameras and comport themselves to the letter of the law. C [REDACTED] a member of the Highway Patrol unit, corroborated this account. He stated further that he understood that criminal activity short of a felony should not be addressed.

⁶ In her October 4, 2012 statement to the Department’s Internal Affairs Division, G [REDACTED] reported that the beer bottle was open, a fact she confirmed in her testimony at Josey’s criminal trial. (Union Exhibit 8 & 14.)

towards her.⁷ She denied throwing beer or any liquid at the police. Instead, believing the officers were coming for the person who had thrown the liquid, she reported turning to get out of their way. She stated that none of the officers spoke to her as they approached.

Although she did not see what happened next, she said that as Josey reached her, she was hit on the left side of her face and fell to the ground striking her left elbow on the pavement.⁸ At this point, Josey handcuffed and arrested her. When she asked, "what happened," she recalled Josey replied, "This is for throwing water at the police." She was then placed in a police van where she was held for approximately forty-five minutes until Josey returned and issued her a Summary Offense Citation. (City Exhibit 3.) She stated that at no time did Josey or any other officer inquire whether she wanted to receive medical treatment for her injuries, which included cuts and bruising of her lip and elbow. (City Exhibit 2.)⁹

Josey provided an alternate account of this incident. He testified that as he and his fellow officers effected a vehicle stop of a driver doing "doughnuts" in the intersection, the surrounding crowd of revelers moved in behind them. According to Josey, at this point, the crowd's tone turned negative as individuals began booing and throwing bottles that broke at the officers' feet. Next, he recalled that a spray of liquid, which he believed was beer, hit him and his fellow officers from behind. When he turned towards the crowd, he saw G [REDACTED] jumping up and down with a beer bottle in her hand.

⁷ G [REDACTED] testified that Josey was accompanied by more than 10 officers, and possibly as many as 20. The video of this incident shows only four officers accompanying Josey as he approached Guzman. (City Exhibit 1.)

⁸ During her testimony, G [REDACTED] provided a physical demonstration of the manner in which Josey struck her in the face. However, she subsequently acknowledged that she based this demonstration not upon her own independent recollection, but her subsequent viewing of the video of this incident.

⁹ On January 28, 2013, C [REDACTED] filed a civil lawsuit against the City and Josey based upon these events. (Union Exhibit 2.) The parties agreed to a settlement in that matter prior to the hearing in this case.

He concluded she was responsible for the beer throwing because she was only one close enough to have done so. Shortly thereafter, he felt more liquid being thrown and observed "silly string" being sprayed from behind his fellow officers. Again, when he turned, he saw G [REDACTED] standing nearby.

Concluding that she should be arrested for these actions, Josey recounted that he turned, made eye contact, and directed her to put down the beer bottle she was holding. She did not comply with his directive, but turned and began moving quickly in the opposite direction. Josey detailed that upon reaching G [REDACTED], he swung his right hand in an attempt to swat the beer bottle from her hand. Despite his prior statements, he denied that in doing so he struck G [REDACTED] in the face. He explained that his prior statements in which he acknowledged hitting G [REDACTED] inadvertently reflected an assumption he made from seeing her fall to the pavement and arise with a bloody lip.

Police Officer S [REDACTED] D [REDACTED], who accompanied Josey as he approached G [REDACTED], described Josey's action towards G [REDACTED] as "open-handed sideswipe." He related that Josey's hand made contact with G [REDACTED] at chest or shoulder level.

Police Officer C [REDACTED] C [REDACTED], who also was in the group of officers accompanying Josey, reported hearing him instruct G [REDACTED] to drop the beer bottle. He recounted further that when she failed to comply, Josey repeated the instruction and then swung his hand, which made contact with her face.

In his testimony, Josey also recalled that after G [REDACTED] fell to the pavement, he handcuffed and arrested her. Upon seeing her bloody lip, he offered to arrange for medical assistance, but she declined, stating, "She just wanted to leave." At this point, he handed her off to a member of the Department's "wagon crew," and then prepared and

issued her Summary Offense Citation charging her with disorderly conduct for “thr[owing] beer on several [police officers] who were conducting a car stop.” (City Exhibit 3.)¹⁰

Josey also confirmed that upon returning to his unit at the end of his tour that day, he prepared a Use of Force Report concerning his arrest of G [REDACTED]. (City Exhibit 4.) In the report’s summary of incident, he recorded observing G [REDACTED] throw beer on him and several other officers. In addition, he reported that after G [REDACTED] refused his directive to put down the beer bottle she was holding, he attempted to smack it away with an open hand and inadvertently struck her face. Finally, he noted that G [REDACTED] fell and hit her face on the curb, and although bleeding from her lip, refused the offer of medical treatment.

Police Commissioner Charles Ramsey testified that he learned of this incident involving Josey and G [REDACTED] the following day, October 1, 2012. He explained that the Department’s Real Time Crime Center notified him that a video recording of the incident had been posted on the YouTube website, and provided him with a link to the posting. (City Exhibit 1.)

He recounted that after viewing the video several times, he concluded that Josey had used excessive force against G [REDACTED]. This determination, he explained, was based on a number of factors, including the number of police officers present, the nature of the incident, the size disparity between Josey and G [REDACTED], and that none of the other officers present reacted similarly by employing physical force against G [REDACTED]. In describing the

¹⁰ At that same time, he also completed a “Complaint or Incident Report.” In describing the events in that report, he stated, “While conducting a [car stop] below [G [REDACTED]] threw beer on me and several other officers. When taken to ground [she] struck her mouth on ground while being cuffed.” (City Exhibit 5.)

contents of the video, he stated that it depicts Josey taking a “round house” swing at G [REDACTED], which struck her face and knocked her to the ground.

Ramsey testified further that after reviewing the Summary Offense Citation and Use of Force Report that Josey completed relative to this incident, he determined they contained false entries. This conclusion, he explained, was based upon discrepancies between certain factual statements reported in these documents and the content of the video. According to Ramsey, while these reports state that G [REDACTED] threw beer on Josey and other officers, the video reveals that it was actually thrown by another person located somewhere behind G [REDACTED]. Moreover, he noted, the video shows Josey looking in the opposite direction when the beer was thrown rendering it impossible for him to have observed who had thrown it. In addition, he highlighted that the Use of Force Report states that upon falling, G [REDACTED] struck her face on the curb, yet the video reveals she fell several feet from the curb.

Testifying as an expert on use of force, R [REDACTED] T [REDACTED], a police procedures consultant, provided a contrary opinion of Josey’s physical interaction with C [REDACTED]. (Union Exhibit 4.)¹¹

He explained that the standard of appropriate force does not mandate that an officer use only “the least intrusive level of suitable force.” Instead, the test is whether the level of force employed was reasonable based upon the totality of the circumstances known to the officer at the time of the incident. He detailed that the circumstances to be considered would include such factors as size, age, sex and skill of the individual being

¹¹ In testifying, T [REDACTED] referenced a frame-by-frame version of the video that the Union developed using a specialized software. (Union Exhibits 5 & 6.)

subdued, as well surrounding conditions such as size and mood of any crowd present, and number of fellow officers present to assist.

Examining the circumstances in this case, he noted that the chaotic conditions, which appeared to be escalating at the time of Josey's encounter with G [REDACTED] represented a potential "flashpoint" by which the crowd could quickly transition from "happy reveling" to "assaultive behavior." Consequently, he explained, any arrest of a crowd member needed to be accomplished quickly with the individual removed promptly from the immediate area. In view of these conditions, he opined, the force Josey employed in arresting G [REDACTED] was appropriate. In order to accomplish this arrest quickly and safely, it was reasonable for him to conclude that he needed to swat the beer bottle from her hand once she refused his order to drop it.

On October 4, 2012, Ramsey suspended Josey and issued him a Notice of Intention to Dismiss. (Joint Exhibit 4.) The Notice specified that Josey was charged with "Conduct Unbecoming" in violation of Department Disciplinary Code Sections 1-§010-10 (i.e., making a false entry in any Department record or report) and 1-§012-01 (i.e., unauthorized and/or excessive use of force in your official capacity). (Joint Exhibits 4 & 6.) Effective November 1, 2012, Ramsey formally discharged Josey for these reasons by means of Commissioner Direct Action. (Joint Exhibit 5.)¹²

This action prompted the instant grievance. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 3.) Pursuant to their contractual procedures, the parties selected me to hear and decide the case.

¹² Subsequently, in connection with the events of September 30, 2012, the Commonwealth of Pennsylvania charged Josey criminally with a single count of simple assault. Following a trial in Municipal Court, he was found not guilty of that charge. (Union Exhibit 9.)

I held a hearing on June 24 -- 25, 2013, at the offices of Jennings Sigmond, P.C. in Philadelphia, PA. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the second day of hearing, I declared the hearing record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Lieutenant Jonathan Josey, effective November 1, 2012?
2. If not, what shall be the remedy?

Positions of the Parties

As a preliminary matter, the City stresses that this case does not involve a determination as to the propriety of the Department's policing practices for the Puerto Rican Day Parade after-party. Such policy decisions, it argues, are beyond the scope of this matter. Instead, it submits that the sole issue to be decided here is whether it had just cause to discharge Josey. It asserts that on the record presented, it has unquestionably satisfied its burden in that regard. More specifically, it maintains that the evidence conclusively demonstrates Josey's guilt on both charges.

Addressing the charge of filing false reports, it points out that on the Summary Offense Citation, Josey reported that C [REDACTED] had thrown beer on him and his fellow officers, and in the Use of Force Report, he stated that he actually saw her do so. Both statements, it avers, are plainly false. Indeed, Josey admitted as much. He never saw her

throw beer or any other liquid. Instead, as he acknowledged, his basis for concluding she had done so was strictly circumstantial. Therefore, by reporting that he had personal knowledge of her criminal conduct, Josey is guilty of this charge.

Turning to the second charge, it asserts that there can be no dispute that Josey used force against G [REDACTED]. The video clearly shows that Josey struck G [REDACTED], a fact corroborated by two eyewitnesses, D [REDACTED] and C [REDACTED]. Further, Josey admitted doing so in his Use of Force Report. As such, it contends that the only issue to be decided is whether the force used was excessive or unauthorized. It concludes that the evidence shows it was both.

It points out that all officers on the after-party detail were directed to refrain from making arrests except for offenses jeopardizing their safety or that of others. G [REDACTED] possession of a beer, even if open, did not meet that standard. As such, any force that Josey employed in arresting her for that reason was, by definition, unauthorized.

It acknowledges that Josey claims it was her throwing beer at the officers, and not simply her possession of an open container, that crossed the line and necessitated her arrest. It avers, however, that he never actually saw her do so. Therefore, his actions in arresting her amounted to an unauthorized use of force.

It argues further that judged by any proper standard, the force employed by Josey against G [REDACTED] was indisputably excessive. It highlights that he had options by which he could have used a lesser degree of force to accomplish his objective, such as physically restraining and then escorting G [REDACTED] away from the crowd. Yet, he chose to strike at her with a violent swing of his hand. It stresses that Josey's choice of action

carried a very obvious risk of serious injury to G [REDACTED] which was realized when he struck her face and drove her to the pavement.

Accordingly, having established Josey's guilt on the charged offenses, it submits that there can be no question that it had just cause to discharge him. Therefore, it asks that his discharge be sustained and the grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to discharge Josey based on the events of September 30, 2012. It submits that the City has failed to meet its burden of demonstrating that Josey committed either of the charged offenses.

It argues that the first charge (i.e., making a false entry in a Department report) requires proof of an intentional misrepresentation. Mere error is insufficient. It avers that the City has plainly failed to make this requisite showing. To the contrary, the record confirms that Josey completed both the Summary Offense Citation and Use of Force Report based on what he honestly believed had occurred.

It reasons that the video does not prove false Josey's statement that G [REDACTED] had thrown beer on him and his fellow officers. It does not dispute that the video depicts a person other than G [REDACTED] throwing beer at the officers. It submits, however, that the video does not tell the whole story. Citing T [REDACTED] testimony, it explains that shortly before the events captured on the video, G [REDACTED] did throw beer at Josey and his fellow officers who had their backs to her. Therefore, when Josey turned immediately thereafter and saw that G [REDACTED] was the only person in close proximity holding a beer, he reasonably concluded she was the person responsible.

Addressing the second charge (i.e., the excessive use of force), it maintains that here too, the City places undue weight on the video. It submits that what the video appears to show is not what actually occurred. Contrary to the impression created from viewing the video at normal speed, Josey did not strike G [REDACTED] in the face knocking her to the ground and bloodying her lip. In fact, he did not even make physical contact with her. Instead, referencing the frame-by-frame version of the video, it avers that G [REDACTED] fell after stepping on a can and losing her balance. The cuts she sustained came from accidentally biting her lip as she hit the street.

It argues in the alternative that if it is found that Josey's hand did make contact with G [REDACTED], it was inadvertent, and therefore, cannot support a finding of excessive force.

Accordingly, for all these reasons, the Union asserts that its grievance should be granted, and the requested relief be awarded.

Opinion

There can be no dispute that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct in the performance of their duties. This no doubt includes the expectation that officers complete all Department records and reports truthfully. Likewise, the Department's obligation to safeguard the public that it serves mandates the enforcement of standards on the appropriate use of force. To this end, the Department has the indisputable right to discipline any officer who violates such expectations of conduct.

The City, of course, carries the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Josey committed the charged offenses. It

must also establish that the level of discipline imposed is appropriate. The Union, on the other hand, has no corresponding burden. It need not disprove the charges against Josey. Indeed, he is entitled to a presumption of innocence.

On review, the record convinces me that the City has failed to meet its burden. My reasons for this conclusion follow.

It strikes me that the Department's decision to discharge Josey was driven principally by the charge of unauthorized or excessive use of force. Therefore, I will address that charge first.

The City premises this charge upon the assertion that Josey, in effecting G [REDACTED] arrest, intentionally struck her with a violent roundhouse swing that knocked her to the ground and caused injuries to her face and arm. Such conduct, if proven, would undoubtedly amount to a very grave transgression by Josey notwithstanding the chaotic conditions present at the time. The record, however, does not support such a finding.

I have carefully reviewed the video of this incident on which the City's case largely rests together with all of the other evidence presented, including the frame-by-frame version of the video produced by the Union. I am not persuaded that the record substantiates that Josey engaged in an excessive use of force against Guzman.

A proper review of the video must begin with first discerning the context of the actions depicted. In this regard, on the basis of the testimony presented, I am persuaded of the following: Josey, having concluded G [REDACTED] was responsible for the beer throwing, decided to arrest her; he then directed her to put down the beer bottle she was holding; and when she failed to do so, he swung his hand to knock it away.

I found Josey's testimony to this effect to be clear, consistent and convincing. It withstood rigorous cross-examination well. In addition, it was corroborated in key respects by the testimony of other witnesses. This included confirmation that G [REDACTED] had thrown beer at Josey and the other officers, and Josey instructed her to put down the beer bottle she was holding before he swung his hand. In sum, I found his account to be credible.

G [REDACTED] contrary testimony lacked such persuasiveness. Her recollection of the events reflected obvious gaps and serious inconsistencies. Moreover, by her own acknowledgement, she did not see Josey swing his hand. Therefore, she could not state with any certainty whether he swung at her or at the beer bottle she was holding.

Mindful of this context, I next examined both the original video and the frame-by-frame version produced by the Union. When the relevant portion of the original video, which spans just three seconds, is viewed at normal speed, it certainly appears to cast doubt on Josey's stated intention, suggesting he deliberately struck out at G [REDACTED] and knocked her to the ground. However, upon review of the frame-by-frame version of the video, a very different picture emerges, one that is fully consistent with Josey's account. From this version of the video, it is apparent that G [REDACTED] did not fall to the street from the force of being struck by Josey's hand. Rather, she fell because she slipped and lost her balance after accidentally stepping on a can as she moved away from him.

I do find based upon the video and the reported observations of D [REDACTED] and C [REDACTED] that Josey did make physical contact with G [REDACTED] when he swung his hand towards her. However, in contrast to the impression conveyed when the video is viewed at regular speed, the force of this contact was by no means a knock down blow. Rather, it was

glancing in nature, and therefore, in keeping with a failed attempt to knock the beer bottle from G [REDACTED] hand as she suddenly slipped and fell.

In sum, the evidence presented does not substantiate that Josey engaged in an excessive use of force towards G [REDACTED]. I am persuaded that in arresting G [REDACTED] for throwing beer at him and his fellow officers, Josey acted reasonably.¹³ In attempting to swat away the beer bottle she had refused to put down, he employed appropriate force to remove a clear safety risk. The resulting physical contact was inadvertent, and therefore, does not alter this conclusion.

Turning to the charge of making a false entry in a Department record or report, I am satisfied that the governing standard requires proof that the false entry was made knowingly and willfully. Proof of an erroneous or mistaken entry without evidence that it was done intentionally is insufficient. This standard is consistent with the gravity the City ascribes to this offense. Judged on this basis, I find that the City has failed to establish that Josey is guilty of this charge.

The City, as Ramsey testified, based this charge on two discrepancies between the records completed by Josey (i.e., Summary Offense Citation and Use of Force Report) and the contents of the video. These discrepancies involve his statements that G [REDACTED] threw beer at him and his fellow officers, and subsequently struck her face on the "curb" when she fell to the ground during her arrest.

As to the first of these two discrepancies, the video does show someone other than G [REDACTED] throwing beer or another liquid at the backs of the police officers engaged in the vehicle stop. However, that fact is not dispositive of this charge. The beer throwing that

¹³ I am satisfied from the evidence presented that Josey had a proper basis, albeit circumstantial, to conclude that G [REDACTED] had thrown beer at him and his fellow officers, and therefore, did not employ unauthorized force in arresting her for that reason.

Josey attributed to G [REDACTED] as corroborated by T [REDACTED], occurred at the outset of the vehicle stop. The video, which begins some time after the vehicle stop was in progress, simply did not capture this prior conduct by G [REDACTED]. Therefore, the cited discrepancy is of no consequence.

In reporting on this issue in his Use of Force Report, Josey unquestionably erred in stating that he “observed” G [REDACTED] throw beer.¹⁴ Instead, as his own testimony reflects, he only deduced that she had done so based upon his observations immediately after being hit with beer from behind. However, without more, I cannot find that this reporting error represents a willfully false entry by Josey. There is simply nothing that suggests that Josey’s recording of this statement involved an intent to deceive.

Likewise, I am convinced that the second discrepancy cited fails to substantiate this charge. It involves nothing more than a minor factual error. Namely, Josey’s Use of Force Report states G [REDACTED] struck her face on the curb; whereas, the video shows her face actually hit the street as she fell several feet from the curb.

Accordingly, for all these reasons, the Union’s grievance is granted.¹⁵

¹⁴ In contrast, on the Summary Offense Citation, Josey recorded only that G [REDACTED] had thrown beer. He did report personally observing her doing so.

¹⁵ Testimonial and documentary evidence was presented concerning whether Josey failed to offer G [REDACTED] medical assistance for her injuries. I conclude that this issue is outside the scope of the charges for which Josey was discharged. Therefore, I make no finding as to it.

AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge Jonathan Josey, effective November 1, 2012.
3. The City will promptly restore Jonathan Josey to his former position within the Department as a Lieutenant in the Highway Patrol Unit without loss of seniority.¹⁶ In addition, the City will make him whole for all wages and benefits lost as a consequence of his suspension and subsequent discharge through the date of his reinstatement, less all outside wages and other earnings received by him as to this period. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to him based on this award, including the issue of whether Mr. Josey satisfied his obligation to mitigate his damages.
4. The Department will revise Jonathan Josey's personnel record to delete all references to his November 1, 2012 discharge to the maximum extent permitted under the governing law.

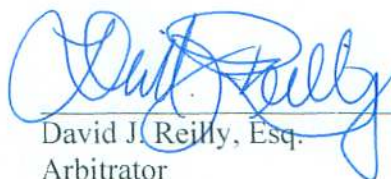
August 10, 2013


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

August 10, 2013


David J. Reilly, Esq.
Arbitrator

¹⁶ If Josey's reinstatement to the Highway Patrol Unit results in an overstaffing, the Department, if it chooses to address the situation, shall do so consistent with the terms of the governing collective bargaining agreement.